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82-6192

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

SAMMY DAVID ROBERTS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF SOUTH CAROLINA

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82-6192

QUESTION PRESENTED

Whether a sentence of death can, consistently with the Fifth, Eighth, and Fourteenth Amendments, be imposed where the scheme of imposition does not apply the reasonable doubt standard, or any objective standard, to the determination that, on weighing the mitigating and aggravating circumstances, death is the appropriate punishment in a given case?

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SAMMY DAVID ROBERTS,

PETITIONER,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

Petitioner Sammy David Roberts prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of South Caroina in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported in State v. Copeland, et al., ___ S.C. ___, Opinion No. 21808, filed November 10, 1982, and is attached hereto as Appendix A to this Petition.

JURISDICTION

The Supreme Court Of South Carolina filed its opinion and, thus, entered its judgment on November 10, 1982. It denied timely petition for rehearing on December 8, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C §1257(3), petitioner having asserted below and herein deprivations of rights secured by the Constitutions of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

and the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

This case also involves the following sections of the South Carolina Code of Laws: S.C. Code Ann. §§16-3-20 and 16-3-25 (Cum. Supp. 1982) [1/]

STATEMENT OF THE CASE

Petitioner was tried before a judge and jury and was convicted of three counts of murder along with accompanying counts of kidnapping and armed robbery. In a second, sentencing proceeding mandated by S.C. Code Ann. §§16-3-20 et seq., the jury faced a decision whether to recommend sentences of life or death for the crimes. The State relied on evidence, presented earlier in the trial's guilt phase, to prove two statutory aggravating circumstances: that the murders had occurred during commission of kidnapping and armed robbery. S.C. Code Ann. §§16-3-20(C)(a)(1)(c) and (e) (Cum. Supp. 1982).

As later noted by the State Supreme Court, State v. Copeland, et al., Appendix A at A14, petitioner offered "extensive mitigating testimony" of a difficult childhood, problems in school, a traumatic death in his family, violent injuries he himself had suffered, drug abuse, and a personality which made him easily influenced by others. Other evidence in mitigation were his refusal to take an active part in at least two of the killings, Tr. 2104-2107, and his affection and concern for his girlfriend and their young child. Tr. 2970-2972.

[1/] Due to their length these statutes are included in Appendix B. References will be to the present 1982 supplement to the 1976 permanent edition of the S.C. Code of Laws. Although these statutes, enacted in 1977, were contained in earlier supplements at the time of petitioner's trial and also when the South Carolina Supreme Court decided petitioner's appeal, the sections applicable to this case have, however, remained unchanged since enactment of the statutes in 1977.

Prior to the jury's deliberation, the judge instructed it, in accordance with S.C. Code Ann. §16-3-20(C), that it could consider any mitigating circumstances it found to exist and any statutory aggravating circumstances it found to exist beyond a reasonable doubt. Tr. 3075-3084. He also supplied the jury with a list of two statutory aggravating circumstances — murder in the commission of (1) armed robbery and (2)kidnapping — and the nine statutory mitigating circumstances enumerated in S.C. Code Ann. §16-3-20(C)(Cum. Supp. 1982). Tr. p. 3106. Beyond that, he offered no guidance as to how the jury should weigh the evidence or what standard of proof it should apply to arrive at its determination of whether the State had convinced it that death was the appropriate punishment.

The jury recommended sentences of death on all three counts of murder. And the judge — as is mandated by S.C. Code Ann. §16-3-20(C), see State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, 802 (1979), cert. denied 444 U.S. 957 — sentenced petitioner to death. Tr. 3099-3101.

On appeal, the State Supreme Court affirmed the trial court judgment and rejected petitioner's argument that the scheme under which he was sentenced to death violated the Fifth, Eighth, and Fourteenth Amendments.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

By way of pre-trial motion (Tr. 3248-3252), petitioner requested that the trial judge "declare unconstitutional" the state statutory capital sentencing scheme because, inter alia, (a) S.C. Code Ann. §16-3-20 did not provide adequate direction for applying aggravating and mitigating circumstances and thus resulted in arbitrary inflicting of the death penalty in violation of the due process guarantees of the United States Constitution; and (b) §16-3-20 "allow[ed] the jury subjective discretion in applying the death penalty" and thus offended the Eighth Amendment. On appeal to the Supreme Court of South Carolina petitioner argued that §16-3-20 violated the Fifth, Eighth, and Fourteenth Amendments because it did not require application of the objective

reasonable doubt standard[2/] to the ultimate determination of whehter, on weighing the aggravating and mitigating factors, the State had proved that death was the appropriate punishment. Brief of Appellant Roberts at 26-29. Petitioner alternatively argued that even if the court would for the first time read into §16-3-20 the appropriate standard, still in petitioner's case the sentencing authority did not apply that standard to the final determination. Id.

Without discussion, the state court held that the capital sentencing statutes were constitutional. State v. Copeland, et al., Appendix A at A5. It also characterized as "frivolous and without merit" the contention that jurors — if instructed to apply the reasonable doubt standard for finding aggravating circumstances — needed to be instructed not to return a binding recommendation of death if they had doubt that it was the appropriate sentence. Appendix A at A10.

[2/] In truth, §16-3-20 does not provide any standard for making that finding.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT TO DECIDE IF THE UNITED STATES CONSTITUTION REQUIRES APPLICATION OF THE REASONABLE DOUBT STANDARD TO THE DETERMINATION OF WHETHER, ON WEIGHING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES, THE STATE HAS PROVED THAT DEATH IS THE APPROPRIATE PUNISHMENT IN A GIVEN CASE.

Neither South Carolina's statutory capital sentencing scheme nor its Supreme Court, in construing those statutes, provides the sentencing authority[3/] any standard to apply or procedure to follow when weighing mitigating and aggravating circumstances. A jury may recommend death only after finding beyond a reasonable doubt that at least one statutory aggravating circumstance exists. State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, 802 (1979), cert. denied 444 U.S. 957; S.C. Code Ann. §16-3-20(C) (Cum. Supp. 1982). Once it finds a statutory aggravating circumstance to exist, however, it has unbridled discretion to choose either life or death. There exists no requirement that it find the aggravating circumstances to outweigh the mitigating ones, no standard to apply if it does engage in a weighing process. And the trial judge, when imposing the jury's decision to inflict death, simply must "find as an affirmative fact that the death penalty is warranted under the evidence ...." State v. Shaw, 255 S.E.2d at 802; S.C. Code Ann. §16-3-20(C) (Cum. Supp. 1982). Again, no standard guides the fact-finding.

3/ South Carolina law provides for a bifurcated capital proceeding. S.C. Code Ann. §16-3-20(B) (Cum. Supp. 1982). If a defendant pleads guilty or otherwise waives a jury trial, the judge determines the sentence in a second, sentencing proceeding, but if the accused has a jury trial on guilt, the same jury must recommend a sentence at the second proceeding. S.C. Code Ann. §16-3-20(B); State v. Truesdale, ___ S.C. ___, 296 S.E.2d 528 (1982). That "recommendation" is binding on the court. State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, 802 (1979). "[T]he court, prior to imposing the death penalty, is required to find as an affirmative fact that the death penalty is warranted under the evidence and is not imposed as the result of [some] arbitrary factor." Id., 255 S.E.2d at 802-803. The State Supreme Court has noted the dilemma confronting a trial judge who feels the binding recommendation is not warranted or results from arbitrary factors, but the court has declined to offer guidance. Id., 255 S.E.2d at 803 n.2. In no case to date has the State Supreme Court faced a situation in which the trial judge declined to follow a jury's recommendation.

Only twice has the South Carolina Supreme Court specifically mentioned this issue. In State v. Shaw, 255 S.E. at 804, the first case it decided under the current death penalty statutes, the court stated:

> Appellants also contend the statutory complex is constitutionally defective because it does not assign numerical values to the aggravating and mitigating circumstances so that the sentencing authority can determine when the mitigating circumstances outweigh the aggravating circumstances. This issue was decided adversely to appellants in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Later, in State v. Thompson, ____ S.C. ____, 292 S.E.2d 581, 584 (1982), the court characterized one of Thompson's arguments as follows:

> Appellant excepts to the application of the Death Penalty Statute to his case. He asserts that S.C. Code Ann. 16-3-20(C) provides no guidelines for the weighing of aggravating and mitigating circumstances.

To this the State Supreme Court replied that "these issues were decided adversely to appellant in State v. Linder, [276 S.C. 304, 278 S.E.2d 335 (1981)[4/]] and State v. Shaw, [255 S.E.2d 799]." State v. Thompson, 292 S.E.2d at 584.

In the present case the South Carolina Supreme Court relied on State v. Linder, 278 S.E.2d 335, and State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980), cert. denied, 449 U.S. 1037 (1981), in holding that the State's capital sentencing statutes are constitutional. Appendix A at A5. Both the Linder and Goolsby opinions relied on the Shaw decision. State v. Linder, 278 S.E.2d at 340; State v. Goolsby, 268 S.E.2d at 35. And Shaw rested, albeit erroneously, on Proffitt v. Florida, 428 U.S. 242 (1976). State v. Shaw, 255 S.E.2d at 804.

[4/] The Linder opinion did not mention this issue. There the court, relying on its earlier Shaw decision, simply said: "The appellant contends that the South Carolina Death Penalty Statutory Complex, Sections 16-3-20 et seq., Code of Laws of South Carolina (1976) is constitutionally defective. We find no reasons to depart from our prior holdings that the complex is constitutional." 278 S.E.2d at 340.

The point at which the sentencing scheme approved in Shaw diverges from the one this Court approved in Proffitt marks not only the area of unconstitutionality of the former but also the point at which constitutional development in death penalty law stops short. Although this Court has held that a conviction cannot rest on any degree of certainty less than proof beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970), it has not decided whether there is a requisite degree of certainty on which a sentence of death must rest.

Proffitt's lead opinion placed considerable emphasis on Florida's requirements that the jury, which (unlike in South Carolina) only performs an advisory role, must determine whether the mitigating circumstances outweigh the aggravating one, and that "'the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.'" Proffitt v. Florida, 428 U.S., at 249, quoting Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). South Carolina has no such standards and safeguards applicable to the jury's fact-finding function, except that it requires the State to prove statutory aggravating circumstances beyond a reasonable doubt. Although Florida's procedure might — at least on its face — minimize "the risk that the death penalty will be imposed in spite of factors which may call for a less severe punishment," Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion), South Carolina's sentencing scheme offers only the hope, not the guarantee, that risk will not materialize.

Some state courts, while keeping an eye on due process guarantees, have construed their state statutes to impose a reasonable doubt standard to the ultimate determination of the appropriateness of the death penalty under the surrounding circumstances. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597, 617 (1979); State v. Wood, 648 P.2d 71, 83-84 (Utah 1982). Several state statutes specifically require juries to apply the reasonable doubt standard when determining whether aggravating circumstances sufficiently outweigh mitigating ones to warrant a death sentence. Ark. Stat. Ann. §41-1302(2) (1977); Ohio

Rev. Code Ann. §2929.03(D)(1); Wash. Rev. Code §10.95.060(4) (Supp. 1981). So the legislatures or courts of many states believe that applying an objective standard to such a determination is indeed both possible and advisable.[5/] This view, however, is not unanimous. Ford v. Strickland, ____ F.2d ____ (11th Cir., Slip Opinion, filed January 7, 1983) (en banc). A majority of the Eleventh Circuit Court of Appeal takes a different view: that the process of weighing mitigating and aggravating circumstances "is not... susceptible of proof under any standard...." Id., at 20. But see Smith v. North Carolina, ____ U.S. ____, 102 S.Ct. 474 (1982) (Stevens, J., opinion respecting denial of cert.). So the various jurisdictions cannot even agree whether applying an objective standard at the punishment-determining stage is even feasible, let alone mandated by due process or Eigth Amendment considerations.

Along with the "quantitative difference [between sentences of life and death], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 238, 305 (1976) (plurality opinion). That there exists a degree of subjectivity, thus a measure of unreliability, in the decision to impose a death sentence should mulitate for a stricter, not lesser, standard of proof. A weaker point needs more reinforcement.

Also, the standard of proof required should correspond to the degree of confidence sought:

5/ Although it has prescribed no objective standard to apply, South Carolina's legislature has viewed the matter of whether a sentence of death is "warranted" as something that can be determined "as an affirmative fact." S.C. Code Ann. §16-3-20(C)(Cum. Supp. 1982). This indicates that the creators of its death penalty statute felt that the final weighing process was indeed fact-finding. Thus it viewed the ultimate fact, appropriateness of the death penalty, as susceptible of proof under some standard, even if it did not specify a standard.

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

Addington v. Texas, 441 U.S. 418, 423 (1979), quoting In re Winship, 397 U.S., at 370. Principles of due process recognize that as the stakes grow, all want a greater degree of confidence that the outcome will be correct.

That a measure of subjectivity is involved here should not discourage this Court from demanding a strict, objective standard of proof. It has not in the past. In Addington v. Texas, 441 U.S. 418 (1979), this Court held that the Fourteenth Amendment due process protections require application of at least a "clear and convincing" evidence standard prior to involuntary commitment of an individual to a state mental hospital. Likewise, in Santosky v. Kramer, ___ U.S. ___, 102 S.Ct. 1388 (1982), it held that due process requirements mandate that same burden of proof when a state seeks to terminate parental right. Surely the state must shoulder a heavier burden when it seeks to terminate a life. The difficulty of proof is no greater, but the stakes are monumentally higher.

In the context of the ordinary criminal trial, application of the reasonable doubt standard is a matter of fundamental fairness. In re Winship, 397 U.S. 358, 363 (1970). Its absence "substantially impairs the truth-finding function." Ivan V. v. City of New York, 407 U.S. 203, 205 (1972). The sentencing phase of a bifurcated capital proceeding is more like a criminal trial than it is like an ordinary sentencing hearing: the prosecutor must shoulder a burden of proof and the jury (where it determines the sentence) is a fact-finder. See Bullington v. Missouri, 451 U.S. 430 (1981). As a result, special precautions — unnecessary in a noncapital case — are essential to eliminate the risk that a death sentence will be imposed despite factors calling for a less severe punishment. Lockett v. Ohio, 438 U.S., at 605.

Not only is the reasonable doubt standard "a prime instrument for reducing the risk of convictions resting on factual error," In re Winship, 397 U.S., at 363 (emphasis added), but also it is a constitutionally mandated protection against factual error when determining "the degree of criminal culpability." Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). This standard is the fundamental vehicle in the Anglo-American legal system for assuring reliability in criminal judgments. It does this by allocating the burden according to the risk:

> There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value... this margin of error is reduced as to him by the process of placing on the other party the burden of... proof... beyond a reasonable doubt.

Speiser v. Randall, 357 U.S. 513, 525-529 (1958). Here the relative differences in the interests the State and petitioner have at stake are pronounced. Just as "proof beyond a reasonable doubt has traditionally been regarded as the decisive [test of]... criminal responsbility" and has been made a mandate of the Fifth and Fourteenth Amendments, so also must the Eighth and Fourteenth Amendments require this same standard to determine whether "death is the appropriate punishment." Woodson v. North Carolina, 428 U.S., at 305.

A South Carolina jury must engage in two sets of fact-finding at the punishment phase of a capital case. It must first, applying the reasonable doubt standard, find if any statutory aggravating circumstance has been proved. Finding that, death is a possible punishment. Then the jury must consider the surrounding circumstances and find whether the State has convinced it that death is the appropriate punishment in that particular instance. At this second stage South Carolina law provides no standard for weighing the factors, no objective gauge of whether the State has proved its case. Beyond the first stage the jury's discretion is essentially unfettered.

Moreover, S.C. Code Ann. §16-3-25 (Cum. Supp. 1982) and its provisions for proportionality review by the Supreme Court

of South Carolina do not cure this constitutional defect. That court does not independently weigh the circumstances of the case. Rather, it determines (1) if "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," (2) if the evidence supports the jury's finding of the existence of a staturory aggravating circumstance, and (3) if the sentence is excessive or disproportionate when compared to that imposed in "similar cases" where the death penalty has also been imposed. S.C. Code Ann. §16-3-25 (Cum. Supp. 1982); State v. Copeland et al., Appendix A at A10-A15. At no time from trial through the appeal is there applied an objective standard to the determination of whether the aggravating factor sufficiently outweigh the mitigating ones to allow a sentence of death.

This Court has not yet addressed this critically important issue. Although it has upheld Georgia's capital sentencing scheme, similar in many respects to South Carolina's, against attacks that it was unconstitutional on its face, its decision did not resolve this dilemma. Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion). If South Carolina's Supreme Court had chosen to construe §16-3-20 to make the reasonable doubt standard applicable to the final determination, as North Carolina[6/] and Utah[7/] courts have done, then the statute, as construed, would be constitutional in that regard. But it has repeatedly refused to do so, and it has refused in petitioner's case.

Because the Supreme Court of South Carolina has erroneously refused to require the standard mandated by the United States Constitution; because confusion exists among the jurisdictions on this matter; and because this Court has not as yet definitively resolved the confusion, the Court should grant this petition for a writ of certiorari, apply the requisite standard of the Fifth, Eighth and Fourteenth Amendments, and vacate petitioner's sentence of death.

6/ State v. Johnson, 298 N.C. 47, 257 S.E.2d 597, 617 (1979).

7/ State v. Wood, 648 P.2d 71, 83-84 (Utah 1982).

CONCLUSION

Petitioner requests that his petition for a writ of certiorari be granted.

Respectfully submitted,

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February 7, 1983.

APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

H. Wesley Copeland and
Sammy David Roberts, ... Appellants.

Appeal From Berkeley County
Marion H. Kinon, Judge

Opinion No. 21808
Filed November 10, 1982

AFFIRMED

Appellate Defender John L. Sweeny, Assistant Appellate Defenders David W. Carpenter and Tara D. Shurling, all of S. C. Commission of Appellate Defense; and David I. Bruck, all of Columbia; and Peter F. Them, II, and John G. Frampton, both of Summerville, for appellants.

Attorney General Daniel R. McLeod, Senior Assistant Attorney General Brian P. Gibbes and Assistant Attorney General Lindy P. Funkhouser, all of Columbia; and Solicitor Charles M. Condon, of Charleston, for respondent.

GREGORY, A.J.: Appellants Wesley Copeland and Sammy Roberts were convicted of armed robbery, kidnapping, and murder. Both received sentences of twenty-five years, life, and death for the respective offenses. They appeal, asserting numerous exceptions. We consolidate their appeals with our mandatory review pursuant to S. C. Code Ann. § 16-3-25 (Cum. Supp. 1981). We vacate their life sentences for kidnapping, and otherwise affirm.

Sometime around midnight, June 18, 1980, Bill Spain and Butch Krause were closing for the night the service station where they worked. They were robbed of One Thousand Ninety-Six and 03/100 ($1,096.03) Dollars, taken from the station in North Charleston to a secluded spot in Berkeley County, and shot to death. In the early morning hours of June 19, 1980, Louie Oakley, a service station attendant in Moncks Corner was robbed of Four Hundred Twenty-Six and 11/100 ($426.11) Dollars, taken to another secluded spot in Berkeley County, and shot to death.

The bodies of the three men were found several days after the murders. Investigations began immediately and continued for several months. On October 24, 1980, upon information given to the authorities by Danny Ray Coker, an accomplice in these crimes, appellants were arrested for the armed robbery, kidnapping, and murder of the three men. Coker was granted immunity from prosecution in exchange for his testimony.

First, appellants challenge the constitutionality of the South Carolina death penalty statutes. We held these statutes constitutional in State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981) and State v. Goulsby, 275 S.C. 110, 268 S.E.2d 31 (1980), cert. denied, 101 S.Ct. 616 (1981).

Next, appellants contend imposition of the death penalty for the crime of murder while in the commission of kidnapping violates the Eighth Amendment prohibition against arbitrary infliction of the death penalty because the statutory definition of kidnapping is overbroad and ambiguous. We held in State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981) and State v. Smith, 275 S.C. 165, 268 S.E.2d 276 (1980), the kidnapping statute is constitutional, not overbroad and ambiguous. This exception is without merit.

Appellant Roberts argues it is unconstitutional to sentence a person to death without finding that he caused or intended another's death. He contends this offends both the Eighth Amendment mandate that any decision to impose the death penalty be based on reason rather than caprice and the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Recently, the U. S. Supreme Court reversed a Florida Supreme Court judgment upholding the death penalty because there was no proof the codefendant killed, attempted to kill, intended or contemplated that life would be taken. Enmund v. Florida, 50 U.S.L.W. 5087 (June 29, 1982).

We think imposition of the death penalty in this case does not offend the standards set out in Enmund, supra. The evidence is clearly sufficient to justify the death penalty. It shows Roberts did, in fact, cause Oakley's death, and, while not the triggerman in the two earlier murders, he was present the entire time the crimes were committed, and he held a gun on at least one of the two victims and forced him to lay on the ground whereupon both men were shot to death. Roberts cannot seriously contend that he did not intend or contemplate that life would be taken.

We do not find the jury's recommendation to be the result of passion, prejudice, or any other arbitrary factor, nor do we find imposition of the death penalty unconstitutional in Roberts' case.

Next, appellants argue the trial judge erred in refusing to change venue to another county.

> A change of venue is addressed to the judicial discretion of the trial judge, and his decision will not be disturbed absent a showing of an abuse of that discretion. State v. Valenti, 265 S.C. 380, 218 S.E.2d 726 (1975). Where the trial judge bases his ruling on adequate voir dire examination of the jurors, his conclusion that the objectivity of the jury panel has not been polluted with outside influence will not be disturbed absent extraordinary circumstances. State v. Fowler, 266 S.C. 203, 222 S.E.2d 497 (1976); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379, cert. den., 409 U.S. 1077, 93 S.Ct. 691, 34 L.Ed.2d 666 (1972).

State v. Neeley, 271 S.C. 33, 244 S.E.2d 522, 524 (1977). Appellants must prove actual juror prejudice. State v. Plath, supra; State v. Goolsby, supra; State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). The record shows maximum precaution by the trial judge to ensure elimination of veniremen who may have been prejudiced by pretrial publicity and the absence of prejudice on the part of the jurors. Appellants' motions for change of venue were properly denied.

Next, appellants argue the trial court erred in denying their motions for continuance. A motion for continuance is addressed to the sound discretion of the trial judge and his ruling thereon will not be disturbed absent a showing of abuse of discretion. State v. Brooks, 271 S.C. 355, 247 S.E.2d 436 (1978). We find no abuse of discretion on the part of the trial judge.

Appellants further argue the trial court erred in disqualifying jurors who oppose the death penalty. This issue was resolved adversely to appellants in State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981); State v. Linder, supra; State v. Goolsby, supra; State v. Tyner, supra.

Next, appellants argue the trial court erred in disqualifying Anthony Gadsden, a member of the venire, because of his strong feelings against the death penalty where the record did not show he was irrevocably committed to vote against imposition of the death penalty. The questioning process of Mr. Gadsden, viewed in its entirety, clearly demonstrates his unwillingness to vote for the death penalty. The questioning process was consistent with the standards established in Witherspoon v. Illinois, 281 U.S. 510 (1968). Thus, the trial court did not err in disqualifying Mr. Gadsden for cause.

Appellants next argue the trial court erred in qualifying a venireman who indicated he would impose the death penalty in every case of aggravated murder. The questioning process of this venireman clearly demonstrates he would not impose the death penalty in every case of aggravated murder, but would follow the trial court's instructions and bring in a life sentence if he thought it was proper. This exception is meritless.

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Appellants argue the solicitor's closing argument at the first phase of the trial was improper. In his closing argument, the solicitor stated, "[Danny Ray Coker] is going to prison for at least -- I submit to you for somewhere around twenty years." Allegedly, this statement is not supported by evidence established at trial and attempts to bolster the credibility of the State's key witness by distracting the minds of the jurors from the fact that Coker received complete immunity from prosecution in exchange for his testimony.

Throughout the record is testimony that Coker will be sentenced to one - twenty (1-20) years for various crimes he committed in Sumter. We do not see how the fact that Coker will be sentenced for other crimes he committed could in any way bolster his credibility. In addition, the solicitor discusses the immunity agreement with Coker in the next paragraph of his argument. Thus, rather than distracting the minds of the jurors from the fact that Coker is receiving complete immunity from prosecution for his part in these murders, the solicitor calls this fact to their minds.

The trial judge has wide discretion in dealing with the range and propriety of the solicitor's argument to the jury, and ordinarily his rulings on such matters will not be disturbed. State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). We find no error.

Next, appellant Copeland argues the trial judge improperly commented on the facts during his instruction on the law concerning the presumption of innocence, and thereby injected his opinion thereof. The instruction complained of is as follows:

> The presumption of innocence accompanies the defendant throughout the trial of this case and, when you go to the jury room to deliberate, it follows the defendant there with you and it entitles him to a verdict of not guilty at your hands until such time as you are convinced that the State of South Carolina has proven to your satisfaction that the defendant is guilty beyond a reasonable doubt. And if the state has satisfied you of the defendant's guilt beyond a reasonable doubt, then that presumption of innocence disappears; and you would write a verdict that speaks the truth of this controversy. (Emphasis added.)

No reasonable interpretation of this portion of the trial judge's charge can result in the conclusion that he commented on the facts and injected his opinion as to the guilt of appellant. This exception is frivolous and without merit.

Appellants next argue the trial judge erred in defining reasonable doubt as "a doubt that is well founded in reason" and "a substantial doubt." The trial judge's definition of reasonable doubt is well within the guidelines set by this Court. State v. Butler, ___ S.C. ___, 290 S.E.2d 1 (1982); State v. Griffin, ___ S.C. ___, 285 S.E.2d 631 (1981). There is no error.

Appellant Copeland argues the trial judge erred in refusing to instruct the jury that their sentencing recommendation would be binding upon the trial judge. We resolved this issue in State v. Linder, supra, at 338-339.

> Use of the word "recommend" by the trial judge or solicitor is not per se suspect. Under the statute "recommendation" is the term applied to the jury's function at this phase of the trial. To instruct the jury that it will recommend what sentence the convicted murderer will be given is not improper and does not mask the true nature of the jurors' responsibility at this phase of the trial.

We find no error.

Appellants argue the trial court erred in failing to instruct the jury that a police officer's testimony concerning a witness's statement prior to trial which is inconsistent with that witness's statement made at trial, is to be considered solely for impeachment purposes. Lieutenant Nettles of the Berkeley County Sheriff's Department testified that Bilangia Thomas, who was in a jail cell next to Coker, told him the guns used in the murders of the three men were buried behind Wesley Copeland's trailer. Bilangia Thomas denied at trial telling Lt. Nettles anything concerning the guns. We held

in State v. Warren, ___ S.C. ___, 284 S.E.2d 355 (1981) that "when a prior inconsistent statement is introduced to impeach a witness, the court, upon request, must instruct the jury that it can consider such evidence for the purpose of impeachment only... ." (Emphasis added). Here, appellants did not request the trial judge to instruct the jury to consider Lt. Nettles' testimony only for impeachment purposes.

Heretofore, South Carolina has followed the traditional rule that testimony of inconsistent statements is admissible only to impeach the credibility of the witness. Henceforth from today, we will allow testimony of prior inconsistent statements to be used as substantive evidence when the declarant testifies at trial and is subject to cross examination. We quote with approval the reasoning by the Supreme Court of Georgia in Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717, 721 (1982), in adopting this new prior inconsistent statement rule:

> [C]ommentators...suggest that the oath is not as strong a guaranty of truth as once it may have been, and the requirements that the jury observe the declarant and that the defendant have an opportunity to cross-examine are met where the declarant takes the stand and is subject to cross-examination. The assertion by a person that the declarant made a prior statement is not itself heresay, and the jury can determine the credibility of the witness on that point. With respect to the truth of the prior statement, the jury has the opportunity to observe the declarant as he may repudiate or vary his former statement, and as he is cross-examined. Thus, the jury can determine whether to believe the present testimony, the prior testimony - or neither.... [P]rior statements...are made closer in time to the event in question, when memories are fresher, and...the traditional rule requires the courts to give unrealistic and confusing instructions to the jury. See 3A Wigmore, Evidence (Chadbourn rev.) § 1018; McCormick, Handbook of the Law of Evidence, 2d ed., § 251, Morgan, Heresay, Dangers and the Application of the Hearsay Concept, 62 Harv. L.R. 177, 192 et seq. (1948).

We believe the adoption of this rule will more effectively aid in the discovery of truth, and more adequately insure the freedom of the innocent and the conviction of the guilty.

Appellant Copeland argues the trial court should have allowed introduction in the sentencing phase of the results of the state's key witness's polygraph examination. Copeland contends the examination revealed deception in some aspects of Coker's story, and this would be relevant in the sentencing phase to show mitigating circumstances.

Generally, the results of polygraph examinations are inadmissible because the reliability of the polygraph is questionable. We decline to create an exception to this general rule in order to allow admission of the results in the sentencing phase of this bifurcated trial for the same reason that it is generally inadmissible - its questionable reliability for scientific accuracy.

Appellant Roberts argues the trial judge chilled appellant's right to testify at the sentencing phase of the trial by allegedly advising him erroneously that his testimony would be admissible in another court if there were a new trial. In response to Roberts' request for advice as to whether his testimony at the sentencing phase could be used against him at a new trial, the trial judge stated:

> "All right, sir. I cannot tell Mr. Roberts whether to take the stand or not. That is a decision that he will have to make. Of course, as you know, if there is a new trial, that record would be admissible in another court."

In State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890, 894 (1979), we stated:

> Each accused, with the assistance of counsel, makes this decision [not to testify] as a part of his trial strategy.

> Under the first principle of ethics and justice, a defendant who secures a ruling of the court, albeit erroneous, should not be permitted to profit...from the court's assent to an impruper trial strategy.

Roberts relies on State v. Adams, ___ S.C. ___, 283 S.E.2d 582 (1981), to support his position that his testimony at the sentencing phase cannot be used against him in determining his guilt or innocence at a new trial. Roberts, with assistance of counsel, chose not to testify at his sentencing proceeding. Apparently, he inferred from the trial judge's remarks that his testimony at that proceeding might be used against him in the guilt or innocence phase of a new trial of the case should there be one. The trial judge did not specifically advise Roberts as to that matter, and Roberts did not ask for a clarification; therefore, we cannot say the trial judge's statement was erroneous. Moreover, the defendant, with assistance of counsel, is the one to decide whether to testify at his trial. He cannot be permitted to profit from his faulty interpretation of the trial court's statement.

Appellant Roberts argues the solicitor improperly inserted his own opinion that capital punishment deters crime into his closing argument at the sentencing phase of the trial. We disagree.

> "While the solicitor should prosecute vigorously, State v. Davis, 239 S.C. 280, 122 S.E.2d 633, his duty is not to convict a defendant but to see justice done. State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976). The solicitor's closing argument must, of course, be based upon this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice. State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965). The trial judge is vested with a broad discretion in dealing with the propriety of the argument of the solicitor to the jury. State v. Durden, supra. Once the trial judge has allowed the argument to stand, as here, the defendant must bear the burden of demonstrating that the argument in effect denied him a fair determination of his guilt or innocence. On appeal, this Court will review the alleged impropriety of argument in the context of the entire record."

State v. Woomer, ___ S.C. ___, 284 S.E.2d 357, 359 (1981) [quoting State v. Linder, 276 S.C. 304, 278 S.E.2d 335, 339 (1981)].

Viewing the argument in the context of the entire record, we find the solicitor's argument is properly within the guidelines set by this Court.

Appellant Copeland argues the trial judge erred in denying his request to instruct the jury of the actual effect of failure to reach a unanimous agreement as to punishment, and in instructing the jury that unanimity is required before a life sentence can be imposed. Copeland asserts the judge misstated the applicable law and inserted an arbitrary factor into the jury's sentencing decision by instructing "irrespective of what your verdict or recommendation is, it must be unanimous on each count, that is, your verdict or recommendation must be the verdict or recommendation of all twelve of you." Allegedly, this instruction might affect the jury's decision to impose life or death unless the jury is instructed that, in the event all cannot agree on a recommendation as to whether the death penalty should be imposed, the trial judge shall dismiss the jury and sentence the defendant to life imprisonment. We disagree.

The trial judge correctly stated the applicable law. We stated in State v. Adams, supra, at 587:

> The language of [§ 16-3-20(C)] provides that where a sentence of death is not recommended by the jury, a life sentence must be given. The situation implicitly envisioned here is that normally the jury will unanimously either recommend life or death. The undecided jury is the exception. That portion of the statute addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury.

There is no error present.

Appellants next argue the trial judge's charge and written statutory instructions concerning mitigating circumstances were insufficient to alert the jurors that they could consider mitigating circumstances other than the nine statutory mitigating circumstances.

Section 16-3-20(C) of the Code requires the trial judge to instruct the jury to consider "any mitigating circumstances otherwise authorized or allowed by law and any . . . statutory . . . mitigating circumstances . . . ." The trial judge fully complied with this provision. This exception is without merit.

Appellant Copeland argues the trial court erred in failing to instruct the jury that life imprisonment means one will actually spend his life in prison. Copeland asserts the jury will consider the possibility of parole in its deliberations and the failure of the trial court to instruct the jury not to consider it injects an arbitrary factor into the trial. Again, we disagree.

The jurors were instructed to base their decisions solely upon the evidence adduced at trial and the law as instructed by the trial judge. While it is true that possibility of parole should not be considered by the jury, it is not the duty of the trial court to anticipate or speculate that jurors might consider it in their deliberations and instruct them accordingly. To do so may, in fact, inject consideration of parole into their deliberations where it may not before have been.

Appellants next argue the trial judge should have instructed the jury that they must find the death penalty is appropriate beyond a reasonable doubt. The trial judge repeatedly instructed the jurors they must find the existence of a statutory aggravating circumstance beyond a reasonable doubt before they could impose the death penalty. He further instructed the jurors that they could recommend a sentence of life imprisonment even if they found the existence of a statutory aggravating circumstance beyond a reasonable doubt. The jurors must have had the phrase "beyond a reasonable doubt" firmly etched in their minds at this point in the bifurcated trial. Surely, appellants would not have us believe a person of ordinary sensibilities would recommend imposition of the death penalty if he had a reasonable doubt that it was an appropriate sentence in that case. This exception is frivolous and without merit.

This appeal represents the sixth occasion for this Court to perform the statutory function known as "proportionality review," mandated by § 16-3-25(C) of the Code. (1977 Act No. 177, section 2, eff. June 8, 1977.) State v. Thompson, ___ S.C. ___, 292 S.E.2d 581, cert. denied, 102 S.Ct. 1996 (1982); State v. Butler, supra; State v. Gilbert, supra; State v. Hyman, supra; State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, cert. denied, 444 U.S. 957 and Roach v. South Carolina, 444 U.S. 1026.

Appellant Copeland attacks the constitutionality of the South Carolina death penalty regime on the basis of this Court's interpretation of § 16-3-25(C) of the Code. The issue is raised in the face of the very recent holding in State v. Thompson, supra, published well before appellant's brief was filed. The issue is raised without the benefit of a petition under Supreme Court Rule 8, section 10, and amounts in our view to a "reopening of closed questions" as discussed in State v. Truesdale, Smith's Advance Sheets, Opinion No. 21799, filed October 19, 1982. Normally the issue would be dismissed without comment. We deem it appropriate, however, to make one final pronouncement on the proper interpretation of § 16-3-25(C) at this time.

The General Assembly of South Carolina has clearly made the policy determination that proportionality review by this Court shall be accorded capital defendants who actually receive a sentence of death. The language of § 16-3-25(C) puts three questions before this Court for review in a given case:

> 1. Whether sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> 2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 16-3-20, and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

It is the third inquiry which constitutes proportionality review in South Carolina. Under the statute, the task of defining "similar cases" and with it the scope of any comparative analysis is plainly and properly left to this Court. As indicated below, both the statutory language and the nature of the task give rise to perplexity. There is, after all, some logic to the view that the heinous crime is sui generis, simply beyond comparison.

A complex of federal constitutional issues has enveloped all death penalty statutes since Furman v. Georgia, 408 U.S. 238 (1972). This Court has taken careful note of U. S. Supreme Court decisions touching upon proportionality review, and we find in these decisions a profound tension between the requirement of individualized sentencing and the notion of comparative review. The avoidance of an arbitrary and capricious pronouncement of the death sentence has now been declared a constitutional mandate. It compels the trier of fact to make specific findings with respect to the particular circumstances of a capital crime and the individual defendant. Bell v. Ohio, 438 U.S. 637 (1978); Lockett v. Ohio, 438 U.S. 586 (1978); (Stanislaus) Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976). In like manner, these cases encourage, while not mandating, an appellate review which accords priority to the particular and distinctive features of each defendant as well as the specific circumstances of the crime for which the death sentence has been imposed. The ultimate outcome, it is suggested by these decisions, should be the infliction of capital punishment upon only those individuals who have been culled from all other defendants by a process which highlights the unique attributes of their personalities and their crimes.

From a logical standpoint, of course, that which is unique is also incommensurable. Herein lies the conflict between particularized sentencing (and review) and the notion of comparing "similar cases." Clearly, a comparative review cannot be permitted to diminish the particularized quality of sentencing, since the latter is now an absolute command of the U. S. Constitution. By the same token, the final resolution of a given appeal, if sentence is to be affirmed, should rest upon the unique correctness of the result in the given instance rather than its coarse resemblance to other cases.

We find that the U. S. Supreme Court has implicitly recognized this tension in that it has carefully avoided imposing any model of appellate review upon the states. Most obvious is the fact that the Texas statute, scrutinized in Jurek v. Texas, supra, provided for no proportionality review whatever. Equally striking is the absence in either Gregg v. Georgia, supra, or Proffitt v. Florida, supra, of any language elevating comparative proportionality review to constitutional prominence. We conclude that the proper balancing of particularized and comparative review, if any, has been left to the states as an "interstitial" matter not appropriate for federal constitutional resolution. "Developments in the Law--State Constitutions," 95 Harvard Law Review 1324, 1356 (1982).

Aside from the problematical nature of this balancing task, there may be other grounds for the apparent reluctance of the U. S. Supreme Court to impose a single model of appellate review upon the states. Comity and diversity of state death penalty regimes present obvious difficulties, although they have not deterred rulings of sweeping effect in the past. See (Stanislaus) Roberts v. Louisiana, supra; Woodson v. North Carolina, supra; Furman v. Georgia, supra. By way of example, we note that § 16-3-25(C) of the Code, bears a strong resemblance to GA CODE ANN. § 27-2537(c)(Supp. 1975), which was challenged and discussed in Gregg v. Georgia, supra. The South Carolina Code, however, does not specify the "universe" of similar cases as does § 27-2537(c) of the Georgia Code. Reading Gregg v. Georgia, supra, along with Proffitt v. Florida, supra, we must conclude that the U. S. Supreme Court has elected to allow diversity among the states to continue, at least in determining the scope of any comparative review.

Encouraging diversity among the states is, of course, a practice that comports well with the basic concept of federalism. It has been explicitly approved by the U. S. Supreme Court in the very setting of criminal law. Speaking for a unanimous Court in Addington v. Texas, 441 U. S. 418, 431 (1979), Chief Justice Burger stated: "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced

into a common, uniform mold." In the same spirit is the "celebrated dictum" of Justice Brandeis in which the individual states were compared to laboratories of social and economic experimentation, a view taken on many occasions since it was first expressed in New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (dissenting opinion). See Brooks v. Tennessee, 406 U.S. 605, 617 (1972) (Burger, C.J., dissenting); Duncan v. Louisiana, 391 U.S. 145, 193 (1968) (Harlan, J., dissenting); Fay v. New York, 332 U.S. 261, 296 (1947) (Opinion of Jackson, J.).

Imposition upon the states of a single design for proportionality review would represent a massive intrusion upon the integrity of state governments within the federal scheme. We cannot assume that the United States Supreme Court would take such a step by mere implication or inadvertence. Rather, we believe such a dramatic curtailment of state autonomy would be openly announced and most likely heralded by decisions preparing a foundation.

Neither formal announcement nor suggestive precedent reveals itself in any of the post-Furman decisions. The due process clause of the Fourteenth Amendment to the U. S. Constitution does not even require states to provide appellate review, as was indicated in Ortwein v. Schwab, 410 U.S. 656, 661, (1973), citing a line of prior decisions including Lindsey v. Normet, 405 U.S. 56, 77 (1972); Griffin v. Illinois, 351 U.S. 12, 18 (1956); District of Columbia v. Clawans, 300 U.S. 617, 627 (1937); McKane v. Durston, 153 U.S. 684 (1894). We find no suggestion that, where state appellate review is granted, the U. S. Supreme Court has mandated any particular mode of conduct, to say less of ruling any mode unconstitutional. Likewise there is no hint that the doctrine of equal protection requires comparative review at the state level. Indeed the application of an equal protection analysis would take the Supreme Court of the United States into the very process of defining "similar cases" which it has declined to enter heretofore. The existence of similarly situated persons is after all a logical precondition for denial of equal protection.

As indicated above, none of the Eighth Amendment decisions following Gregg v. Georgia, supra, have imposed or suggested a preferred method of state appellate review. In the final analysis, it appears that the U. S. Supreme Court itself looks only to the ultimate result, which is preventing the imposition of excessive and disproportionate punishment upon the individual petitioner. In Coker v. Georgia, 433 U.S. 584 (1977) the U. S. Supreme Court vacated a "disproportionate" sentence of death for the crime of rape. In its opinion, the Court made no mention of the Georgia appellate process. While the Court conducted a modified "proportionality review" of its own, the ultimate result was reached independently for, in the words of Justice White, "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 433 U. S. at 598. See also Enmund v. Florida, supra. Another arguably disproportionate sentence was vacated in Godfrey v. Georgia, 446 U.S. 420 (1980). The U. S. Supreme Court there devoted some attention to actions by the Supreme Court of Georgia. The basis of the decision, however, was not the matter of review but the overly broad reading which Georgia had given to one of its statutory aggravating circumstances. It is thus apparent that the Eighth Amendment to the U. S. Constitution does not mandate any mode of appellate review, or even appellate review as such, but only an outcome. That outcome, again, is a penalty imposed on a meaningful basis which can be sustained as neither excessive nor disproportionate in light of the crime and the defendant.

We conclude from the foregoing that the contours of proportionality review, where it exists, have been left to state determination since the U. S. Supreme Court has declined to impose any specific model of review upon the states. § 16-3-25(C) of the Code represents an act of legislative grace by the General Assembly which we are required to interpret in accordance with sound rules of statutory construction.

In our view, the search for "similar cases" can only begin with an actual conviction and sentence of death rendered by a trier of fact in accordance with § 16-3-20 of the Code. We consider such findings by the trial court to be a threshold requirement for comparative study and indeed the only foundation of "similarity" consonant with our role as an appellate court.

We recognize that in some jurisdictions and commentaries it is felt that the reviewing court should compare a given death sentence with a "universe" of cases which includes sentences of life imprisonment, acquittals, reversals and even mere indictments and arrests. Under such a regime, the reviewing court could only determine the size of its

sample or "universe" by some arbitrary device. Fact findings of the trial court, by contrast, provide a fundamental line of demarcation well recognized in and even exalted by our legal tradition. The decisive importance of such findings is evidenced by the language of Article V, section 5, South Carolina Constitution, which limits our review to "correction of errors at law" in all but equity cases.

To expand the notion of a "universe" would also entail intolerable speculation by this Court. Under the South Carolina statute, a jury is not required to state its reasons for failing to recommend a sentence of death. In a given case, the alleged aggravating circumstance may not have been proven to the satisfaction of the jury, while in another "similar case" (expansively defined) the statutory mitigating circumstances or some mitigating factor "otherwise authorized or allowed by law" may have deterred imposition of the death sentence.

This Court would enter a realm of pure conjecture if it attempted to compare and contrast such verdicts with an actual sentence of death. They represent acts of mercy which have not yet been held to offend the United States Constitution. Moreover, they reflect the emphasis upon individualized sentencing mandated by the United States Supreme Court. We will not subject these verdicts to scrutiny in pursuit of phantom "similar cases," when a meaningful sample lies ready at hand in those cases where the jury has spoken unequivocally.

It is axiomatic, of course, that a death sentence infected by prejudicial trial error is a nullity which must be categorically rejected from any comparative review of properly imposed death sentences. Thus our prior decisions vacating and remanding death sentences for retrial must be disregarded in the course of proportionality review. State v. Truesdale, supra; State v. Patterson, Smith's Advance Sheets, Opinion No. 21788, filed September 13, 1982; State v. James Anthony Butler, ___ S.C. ___, 290 S.E.2d 420 (1982); State v. Woomer, ___ S.C. ___, 284 S.E.2d 357 (1981); State v. Plath, supra; State v. Adams, supra; State v. Linder, supra; State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981); State v. Coolsby, supra; State v. Tyner, supra.

It is of no consequence that the South Carolina "universe" has consisted of only five cases to this date. State v. Shaw, supra, presented the first occasion for proportionality review under our current statute. We noted then that no similar cases existed, but the sentence imposed was none the less appropriate and neither "excessive" nor "disproportionate" considering the crime and the defendants. Indeed, a comparable crime involving multiple murder by two or more accomplices, in the course of armed robbery, kidnapping and rape, attended by unspeakable cruelty and mutilation, has yet to come before this Court. Shaw, thus, constitutes a category unto itself.

In like manner, the succeeding three cases of State v. Hyman, supra, State v. Gilbert, supra, and State v. Thompson, supra, proved "similar" in only the most superficial manner--that is, the aggravating circumstance in each instance was armed robbery. The transcripts of these cases are public records, as pointed out in Thompson, supra, and when inspected reveal significant differences between them.

William Gibbs Hyman conspired with four other persons to rob two elderly brothers. The conspirators made their way at nightfall to the victims' home where stealth and deception were initially employed. Failing in their first foray, the conspirators applied violence. One of the victims was able to fire a shot from within before the home was stormed. From the testimony, a jury could have concluded that the decedent was killed by a shot-gun blast fired by Hyman at close range while the victim stood disarmed. It appears that everyone at the scene was intoxicated, but the defendant was sufficiently sober to continue demanding money while he beat the surviving brother with one of the two weapons involved. Mitigating testimony was offered by a clergyman as well as family members who related personal frustrations and tensions suffered by the defendant at some time before the killing. In addition, the defendant himself took the stand to express his remorse. The jury recommended a sentence of death and we affirmed, considering the penalty neither excessive nor disproportionate with respect to the crime and the defendant and notwithstanding the lack of any truly "similar" case to that point in time.

Larry Gilbert and J. D. Gleaton, brothers of whom Gleaton is the elder, robbed and murdered the operator of a filling station shortly after noon following a morning spent cruising in their automobile in search of (and possibly using) drugs. In the course of the robbery, the victim was savagely stabbed seven times as he struggled with Gleaton and was

shot once by Gilbert. From the testimony, a jury could have inferred that the shot was fired while the victim lay on the floor of his business establishment. A witness testified that one of the assailants laughed at the victim in his agony, which testimony was sharply contented by defendants. Mitigating testimony was taken from a clergyman and the defendants' mother. Gilbert and Gleaton in turn took the stand to state that they had acted on impulse and had intended no harm to the victim. The jury recommended death sentences, and we affirmed. The cases of State v. Shaw, supra, and State v. Hyman, supra, offered no assistance by way of comparison, particularly since the latter case had involved an elaborate, multiparty scheme to rob and the use of weapons by the robbery victims. In the crime of Gilbert and Gleaton, the deceased was unarmed and could only use his hands to ward off the repeated thrusts of the knife. We held the sentence of death to be neither excessive nor disproportionate considering the crime and the defendants.

Albert "Bo" Thompson shot and killed the proprietor of a small store in the course of a robbery. In fact the defendant shot his victim twice, the second time in the face from close range. Testimony of an accomplice indicated that the defendant, on the morning of the incident, had determined to rob someone somewhere and that one other store was reconnoitered before that of the victim was chosen. No mitigating testimony was offered, unlike the cases of Hyman, Gilbert and Gleaton. The jury was asked only to consider the defendant's age as well as a brief unsworn statement by him in the course of which he wept and asserted that the killing was an accident. Thompson's crime differed from those of Hyman, Gilbert and Gleaton in other respects, too. The latter defendants all offered some evidence of acting under the influence of alcohol or drugs, while Thompson inferably acted with a clear mind and cool deliberation. Thompson fired the fatal shots, it appears, after his accomplice left the store, whereas Hyman, Gilbert and Gleaton killed their struggling victims in the presence of others or one another. The jury could reasonably have concluded that Thompson acted alone in committing a senseless murder without even a pretext of justification. The jury recommended a sentence of death and, notwithstanding the lack of a truly "similar" case for guidance, this Court found the sentence neither excessive nor disproportionate with respect to the crime and the defendant. In the course of proportionality review, this Court examines the record through the eyes of the sentencing authority. In the case of Thompson, however, this Court could not avoid noting that we had previously affirmed his conviction for an armed robbery occurring subsequent to this murder, one in which the defendant had again held a gun to the head of the robbery victim. State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981). At trial the State had no opportunity to offer this conviction in evidence, yet it clearly would have rebutted, mitigating arguments under § 16-3-20(C)(b)(1) of the Code. We do not consider it amiss to recognize such information regarding an appellant in the course of our final proportionality review.

The remaining case of State v. Horace Butler, supra, involved the abduction, rape and murder of an eighteen-year-old girl as she left her place of employment after dark. The defendant offered his poor record in school, his youth, and the fact that he had a small child as mitigating evidence. We affirmed the conclusion of the jury that a sentence of death was neither excessive nor disproportionate in light of the defendant's character and his wanton crime. No truly "similar" case existed for comparison, and by the same token State v. Butler, supra, offers no guidance in the review of the instant appeal.

Unlike previous cases involving murder and armed robbery, this appeal arises from two separate atrocities occurring in a single night. Unlike Hyman, Gilbert, Gleaton and Thompson, appellants Copeland and Roberts were not content to terrorize and slay their victims where they found them but instead transported them to backroads execution sites. Two of the victims were brought down by gunfire as they sought to escape. Thus wounded, they were subsequently riddled with bullets as they lay on the ground. On the body of one, a series of post-mortem stab wounds was also inflicted.

Mitigating evidence for appellant Copeland was limited to the testimony of his former wife who vouched for the promptness of his alimony and child support payments. She also stated that she had never seen him do anything cruel. More extensive mitigating testimony was offered on behalf of appellant Roberts. Family members as well as a trained psychologist revealed that Roberts had suffered an unhappy childhood, problems in school, the recent traumatic slaying of a brother, drug abuse and injuries in fights and car accidents. Roberts was characterized as having an impulsive personality and being easily led by others. By way of the trial court's charge to the jury, Roberts received the full benefit of the relevant statutory mitigating circumstances. In the end it is probable that the jury relied on the psychologist's own statement that Roberts' prognosis for "straightening up" was poor.

It is our conclusion that no "similar" case exists that would permit meaningful comparative review of these death sentences. In view of the facts set forth above, however, we are satisfied that the sentence of death imposed on each of these appellants was appropriate and neither excessive nor disproportionate in light of their crimes and their respective characters. The sentences are accordingly affirmed.

It should now be clear that proportionality review in South Carolina is first and foremost directed to the particular circumstances of a crime and the specific character of the defendant. Comparative review will be thereafter undertaken if possible. Without hazarding a prediction, we can imagine that the "universe" of similar cases will gradually expand in the fullness of time. At present, South Carolina has found the death penalty to be neither excessive nor disproportionate in six distinct cases: (1) where one or more defendants rob, abduct, rape and murder one or more victims in circumstances which starkly reveal the malignant character of the defendant or defendants; (2) where a victim, armed and defending himself, is slain by an intruding defendant who is himself armed (and possibly intoxicated) while engaged in robbing the deceased; (3) where two or more defendants, on impulse or even while intoxicated rob and murder an unarmed struggling victim in his place of business; (4) where a single defendant, alone with an unarmed and unresisting victim, robs and without mitigation whatever murders the deceased; (5) where a single defendant kidnaps, rapes and murders a victim; (6) where one or more defendants perpetrate multiple offenses by robbing, kidnapping and murdering one or more victims in each separate incident. As comparable cases arise, they will be reviewed against this background. As dissimilar circumstances may lead to affirmed sentences of death, new "classes" or types of capital cases will be added to the existing "pool."

In the foregoing construction of § 16-3-25(C) of the Code, this Court has paid particular attention to the reasoning adopted by three members of the U. S. Supreme Court, speaking through Justice White, in Gregg v. Georgia, supra. As he understood the proportionality function, it was to serve as a mechanism to monitor imposition of death sentences within "classes" or "types" of crimes, those "classes" and "types" being determined by the statutory aggravating circumstances in a given state scheme. 428 U.S. at 223-224. In a concluding passage, Justice White in essence stated the philosophy underlying our definition of "similarity" as he answered complaints that the Georgia statute permitted unconstitutional acts of discretion:

> Petitioner's argument that there is an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment, a lesser penalty, or are acquitted or never charged, seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder.

§ 16-3-910 of the Code provides that one shall suffer the punishment of life imprisonment for kidnapping unless sentenced for murder as provided in § 16-3-20. Since appellants were sentenced for murder, as provided in § 16-3-20, their sentences of life imprisonment for kidnapping are vacated. Their convictions and sentences are otherwise affirmed. A search of the entire record reveals no other error.

AFFIRMED.

LEWIS, C.J., LITTLEJOHN, NESS and HARWELL, JJ., concur.

APPENDIX B

S.C. Code §16-3-20. Punishment for murder: spearate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years, notwithstanding any other provisions of law. Provided, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States of the State of South Carolina or the applicable laws of either. The State, the defendant and his counsel shall be permitted to present arguments for or against the sentence of death. The defendant and his counsel shall have the closing argument regarding the sentence imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:
(a) Aggravating circumstances:
(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;
(2) Murder was committed by a person with a prior record of conviction for murder;
(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer

of the court during or because of the exercise of his official duty;
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;
(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
(b) Mitigating circumstances:
(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person;
(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;
(3) The victim was a participant in the defendant's conduct or consented to the act;
(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;
(5) The defendant acted under duress or under the domination of another person;
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his confuct to the requirements of law was substantially impaired;
(7) The age or mentality of the defendant at the time of the crime;
(8) The defendant was provoked by the victim into committing the murder;
(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

* * * * *

S.C. Code §16-3-25. Punishment for murder; review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any error by way of appeal.

(C) With regard to the sentence, the court shall determine:
(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in §16-3-20, and
(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:
(1) Affirm the sentence of death; or
(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of §16-3-20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. _____

SAMMY DAVID ROBERTS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 1983, I served three (3) copies of the Petition for Writ of Certiorari in the above-captioned case, together with one (1) copy of petitioner's Motion for Leave to Proceed in Forma Pauperis, by depositing the same, postage prepaid, in the United States mail addressed to Assistant Attorney General Brian P. Gibbes, Office of the Attorney General, State of South Carolina, P.O. Box 11549, Columbia, South Carolina 29211. I further certify that all parties required to be served have been so served.

DAVID W. CARPENTER

Counsel for Petitioner

1401 Calhoun Street
Columbia, S.C. 29201
(803) 758-8601

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MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioner, Sammy David Roberts, respectfully moves this Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court. The affidavit of petitioner in support of this motion is attached hereto.

Presented herewith is a petition for writ of certiorari of the moving party.

Respectfully submitted,

DAVID W. CARPENTER
1401 Calhoun Street
Columbia, S.C. 29201

Counsel for Petitioner.

IN THE

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AFFIDAVIT OF SAMMY DAVID ROBERTS
IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Sammy David Roberts, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to pre-pay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1979

   $4.25 an hour

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? No

a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

_____

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Sammy David Roberts

Sammy David Roberts

SWORN TO and subscribed before me
this 3rd day of Feb., 1983.

Thomas Ochs

Notary Public for South Carolina

My Commission Expires: 4-26-89.